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54975-8

NO. 54975-8-I

78611-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CURTIS E. GRAHAM,

Appellant.

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2005 DEC 28 PM 4:57

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY,

The Honorable Ellen Fair  
The Honorable Larry McKeeman

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

On appeal of his convictions for unlawful possession of a firearm and first-degree assault with a deadly weapon, Curtis Graham challenged the admission of his statements to law enforcement under constitutional, rule-based and statutory grounds, the trial court's evidentiary rulings, governmental misconduct, the denial of his right to proceed pro se and the imposition of a five-year sentence for a firearm enhancement where the jury's special verdict found only that he was armed with a deadly weapon. As Graham's lengthy opening brief attempted to anticipate many of the arguments advanced by the State, this reply does not reiterate all of Graham's arguments. Instead, the reply is confined to the portions of the State's brief that misapply relevant constitutional provisions, decisions, and statutes, and that misstate pertinent portions of the record.

1. THE ADMISSION OF GRAHAM'S STATEMENTS TO LAW ENFORCEMENT VIOLATED HIS RIGHT TO COUNSEL, HIS STATE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, AND WASHINGTON'S PRIVACY ACT.

a. The State has failed to respond to the contention that Article I, section 3 of the Washington State Constitution provides greater due process protection than its federal counterpart. In his opening brief, Curtis Graham contended that his fourteen-hour detention by the Bothell Police, the detectives' coercive interrogation tactics, and the denial of

access to counsel violated his federal and state constitutional rights to due process of law, requiring suppression of his statements obtained during the interrogation. Br. App. 13-31. In support of the latter contention, Graham properly analyzed the state constitutional provision under the six factors set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and cited Washington appellate opinions finding the state constitutional provision grants broader due process protections to criminal defendants. Br. App. at 24-31 (discussing, *inter alia*, State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984); State v. Davis, 38 Wn. App. 600, 686 P.2d 1143 (1984) and State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992)).

In response, the State provides no Gunwall analysis of the comparable provisions. Instead, the State asserts, in a footnote, that “The argument has been rejected by the Washington Supreme Court.” Br. Resp. at 15 n. 1. The State’s assertion is incorrect and should be rejected by this Court as set forth below.

First, in support of this claim, the State cites this Court’s opinion in Amunrud v. Board of Appeals, 124 Wn. App. 884, 887, 103 P.3d 275 (2004).<sup>1</sup> Amunrud was a civil case in which this Court reviewed the King

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<sup>1</sup> In the State’s brief, the State incorrectly cites this opinion as State v. Amunrud. Br. Resp. at 15 n. 1.

County Superior Court's affirmance of an order suspending Amunrud's driver's license for failure to make child support payments. 124 Wn. App. at 886-87. This Court affirmed the Superior Court and rejected Amunrud's arguments that the deprivation at issue involved a fundamental right which should be afforded strict scrutiny and that he had been denied procedural due process. *Id.* at 887-92. Thus Amunrud does not provide the appropriate context for analyzing the due process claims here.

More importantly, however, in In re Personal Restraint of Dyer, 143 Wn.2d 384, 20 P.3d 907 (2001), cited by Amunrud,<sup>2</sup> the Washington Supreme Court refused to consider Dyer's claim of broader state constitutional protection because Dyer did not provide the required Gunwall analysis. 143 Wn.2d at 394. For this reason, given the absence of a Gunwall analysis, the Court presumed a coextensive provision. *Id.* Here, Graham has provided the required Gunwall analysis. Contrary to the State's claim, there is no Washington Supreme Court opinion analyzing the issues presented in Graham's appeal solely under the state constitutional due process right. For the reasons articulated in Graham's opening brief, therefore, this Court should conclude the admission of his statements violated his state constitutional right to due process of law.

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<sup>2</sup> Amunrud, 124 Wn. App. at 887 n. 3.

b. The interview was coercive. During Graham's detention, various police officers prevaricated regarding Graham's ability to use a telephone and intimated that his ability to post bail or contact family members or a lawyer hinged on his "cooperation" with the police investigation.<sup>3</sup> The State does not fully respond to Graham's arguments<sup>4</sup> and instead attempts to characterize the investigation as a collection of unrelated moments without addressing their cumulative effect. See Br. Resp. at 17-19. In lieu of citing to cases, the State employs a novel mathematical "formula" in favor of the claim that the coercive effect of Detective Blessum's misrepresentations to Graham would have been dispelled when he ultimately waived his rights. The State's analysis is unpersuasive and unsupported by authority. RAP 10.3(a)(5); State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1971). This Court should reject the State's novel theory.

c. Law enforcement reinitiated contact with Graham after he requested counsel. Where an accused person has invoked his right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation."

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<sup>3</sup> The coercive tactics are discussed and extensively analyzed in Graham's opening brief at 15-22.

<sup>4</sup> For example, the State wholly ignores Graham's discussion of the officers' refusal to terminate the interrogation until Graham provided a statement. See Br. App. at 16-17.

Edwards v. Arizona, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1980). Graham assigned error to the trial court's finding of fact 18, in which the court found that Graham's right to counsel was not violated because Graham asked the detectives a question after requesting a lawyer. Br. App. at 9. To counter this finding, Graham quoted the pertinent portion of the transcript of the interrogation, which establishes Detective Ungvarsky reinitiated contact with Graham by mentioning "Vivian Moore" to him. Ex. 2 at 84; Br. App. at 21. Although the State did not challenge the transcript below or here, the State nonetheless claims "Exhibit 2 and the detective's testimony clearly show the defendant did not want his interview to end." Br. Resp. at 21. This Court should reject the State's inaccurate claim, and hold that Graham's right to counsel was violated when Ungvarsky reinitiated contact notwithstanding Graham's invocation.

d. The admission of the statements violated Washington's Privacy Act. The State claims law enforcement strictly complied with RCW 9.73.090, and urges this Court to disregard the authority cited by Graham for suppression of all of his statements because that authority analyzes RCW 9.73.050.<sup>5</sup> Br. Resp. at 23-24. The State's claim is

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<sup>5</sup> The State also claims that Ungvarsky did not know who started the videotaping, even though Ungvarsky testified he turned on the video

unavailing for two reasons. First, law enforcement did not comply with the legislative mandate that Graham's consent "conform strictly" with these requirements of RCW 9.73.090:

- (a) *the arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording,*
- (b) *the recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof,* (c) *at the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording,*
- (d) the recordings shall only be used for valid police or court activities.

State v. Cunningham, 93 Wn.2d 823, 829-30, 613 P.2d 1138 (1980)

(citing RCW 9.73.090) (court's emphasis); accord State v. Mazzante, 86 Wn. App. 425, 428-30, 936 P.2d 1206 (1997) (rejecting State's contention that "substantial compliance" with the statute's terms is all that is required).

In Cunningham, the Supreme Court affirmed the Court of Appeals' finding that the admission of taped recordings at the defendants' manslaughter trial did not strictly conform to the statutory requirements of RCW 9.73.010 et. seq., and thus were inadmissible. 93 Wn.2d at 828. Here, similarly, when law enforcement secretly videotaped Graham's

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recorder "in anticipation of going in and talking to Mr. Graham." Compare Br. Resp. at 3 with 4RP 32-34.

interrogation, the State did not strictly conform with RCW 9.73.090's mandatory requirements because the officers did not tell Graham that "such recording" was being made. For this reason, suppression of *all* of Graham's statements was required.<sup>6</sup> State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990); State v. Salinas, 121 Wn.2d 689, 693, 853 P.2d 439 (1993); State v. Faford, 128 Wn.2d 476, 488, 910 P.2d 447 (1996).

The second basis for rejecting the State's argument is contained in Cunningham itself. The Cunningham Court criticized the State's "oversimplification" of the strict consent requirement contained in RCW 9.73.090 and observed,

In short, while RCW 9.73.030 authorizes the use of a recorded statement obtained after the prior consent of all persons engaged therein, RCW 9.73.090(2) controls the nature and means of obtaining that consent. *The two statutory provisions are interrelated parts of a single statutory scheme.*

93 Wn. App. at 828, 830 (emphasis added).

Thus, this Court may properly rely on the Faford, Fjermestad and Salinas holdings to conclude that Graham's statutory right to privacy was violated by the secret videotaping. The State's argument to the contrary is without merit.

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<sup>6</sup> The State's claim that Graham would only be entitled to suppression of the portions of the interview where the video recording was used to supplement the audio recording is made without citation to authority and should be rejected by this Court.

e. Graham had an expectation of privacy in his statements.

Graham alternately contended the admission of his statements violated his state constitutional right to privacy, contained in Article I, section 7. In response, the State claims Graham did not have an expectation of privacy “in a conversation with police officers that he knows is being taped.” This pat assertion ignores the critical fact that Graham did *not* know the conversation was being videotaped. As our Legislature has recognized, Washington citizens have the right to regard conversations with government officials as private. RCW 9.73. et seq.; Faford, 128 Wn.2d at 481 (Washington’s Privacy Act is one of the “most restrictive in the nation”). Certainly, Graham had the right to expect he would be informed and given an opportunity to consent to any videotaping of his interrogation. The State’s claim that Graham had no reasonable expectation of privacy is therefore also without merit. For the reasons set forth in Graham’s opening brief, this Court should alternately conclude the secret videotaping violated Graham’s state constitutional right to privacy. Br. App. at 39-43.

2. *RECUENCO* MANDATES REVERSAL OF GRAHAM’S SENTENCE.

Under State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), cert. granted, 2005 U.S. LEXIS 7658 (October 17, 2005), Graham

challenged the imposition of a five-year firearm enhancement, where the jury found by special verdict only that Graham was armed with a deadly weapon, as violating his constitutional rights to a jury trial and due process of law. In response, the State attempts to narrow Recuenco's holding and resurrect a harmless error rule, claiming that because the jury convicted Graham of first-degree assault, it necessarily found he was armed with a firearm. Br. Resp. 35-37. The State's arguments were rejected by Recuenco itself.

In Recuenco, the State accused the defendant of second degree assault for assaulting his wife while holding a gun. 154 Wn.2d at 158. At the State's request, the court submitted a special verdict that Recuenco was armed with a deadly weapon at the time of the commission of the crime. Id. at 159. On review, the Washington Supreme Court held the firearm enhancement violated Recuenco's Sixth Amendment right to a jury trial as defined by Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.3d 2d 403 (2004). In so concluding, the Court reasoned, "Without an *explicit firearm finding* by the jury, the court's imposition of a firearm sentence enhancement violated Recuenco's jury trial right as defined by Apprendi and Blakely." 154 Wn.2d at 162. Then, citing its opinion in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192

(2005), Court found the error could not be harmless – even though there was no evidence from which the jury could have found Recuenco was armed with a deadly weapon other than a firearm.

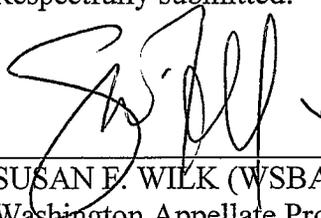
Given Recuenco’s facts and broad requirement of an “explicit finding” by the jury, the State attempts to draw a distinction where there is no difference. This Court should conclude the five-year firearm enhancement violated Graham’s Sixth Amendment right to a jury trial and remand for imposition of the two-year enhancement authorized by the jury’s deadly weapon finding.

**B. CONCLUSION**

For the reasons stated herein and in Graham’s opening brief, this Court should reverse Graham’s convictions and sentence.

DATED this 28<sup>th</sup> day of December, 2005.

Respectfully submitted:



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
V.	)	COA NO. 54975-8-1
	)	
CURTIS GRAHAM,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF SERVICE**

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 28<sup>TH</sup> DAY OF DECEMBERR, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF DECEMBER, 2005.

x \_\_\_\_\_ *graham*

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